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IN THE

Supreme Court of the United States

HANNA STEEL CORP., ET AL.,

Petitioners,

v.

KATIE LOWERY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED

This case raises two interrelated questions that determine whether civil actions, class actions, and mass actions may be removed to federal court. On the first question, the Eleventh Circuit widened a longstanding circuit split. On the second question, the Eleventh Circuit's decision contradicts this Court's jurisprudence. The questions are:

1. When a plaintiff fails to seek a sum certain in a state court complaint, what burden must a removing defendant carry to prove the amount in controversy exceeds 28 U.S.C. § 1332's jurisdictional minimum: proof of an "unambiguous statement" by the plaintiff that "clearly establishes jurisdiction," as the Eleventh Circuit held below; proof by a "preponderance of the evidence," as the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits require; or proof by a "reasonable probability," as the Second Circuit requires?

2. If the evidence on the amount in controversy is uncertain, does a district court have discretion to permit discovery concerning the jurisdictional facts, as this Court has held, or is the district court barred from allowing jurisdictional discovery, as the Eleventh Circuit here held?

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ARGUMENT

A subtle irony pervades Respondents' opposition. They argue that what should matter in determining whether this case implicates a split worthy of this Court's attention is not the way the various lower courts have "label[ed]" the removing defendant's burden of proof, but rather what each court has "really," in substance, required defendants to prove. BIO 9. On that reasoning, Respondents assert, the Second Circuit's "reasonable probability" standard does not evince a split; it is "really," they say, the same preponderance-of-the-evidence test other circuits have adopted. *Id.* But having just put substance over form, Respondents then put form over substance. The Eleventh Circuit's requirement of a clear statement unambiguously establishing jurisdiction doesn't diverge from other circuits' law, they say, because the Eleventh Circuit also purported to march under the preponderance-of-the-evidence banner. *See id.* at 10.

Respondents' initial instinct is right: substance, not form, should control. But their end conclusion is wrong. However the Eleventh Circuit might have labeled its analysis, the court was not, in substance, employing the preponderance standard used in other circuits. Respondents cannot invoke a label to paper over this real and significant conflict in federal law. Because that conflict has a profound effect on the everyday practice of law, this Court should resolve it.

I. The Eleventh Circuit's decision implicates a clear and significant split on the burden of proof.

In trying to downplay the widely acknowledged split, *see* Pet. 10–11, Respondents mischaracterize the Eleventh Circuit's decision, misread Second Circuit law, and ignore a host of lower-court decisions that counsel strongly in favor of cert.

A. The Eleventh Circuit's unambiguous-statement requirement is different from the preponderance standard used in other circuits.

As amici attest, the Eleventh Circuit's unambiguous-statement standard, which allows plaintiffs to manipulate their complaints to evade federal jurisdiction, eviscerates defendants' removal rights in three very litigious Deep South states. *See* DRI Br. 8–18; PLAC Br. 19–23. Respondents nevertheless characterize the decision below as "in accord with the other circuits which have adopted a standard" because the Eleventh Circuit "continued to utilize the 'preponderance of the evidence' standard in the present case." BIO 8. But that is an exceedingly formalistic view of what happened below. As our petition noted, it is true that in setting out the unambiguous-statement standard, the Eleventh Circuit formally "glanced toward a preponderance test." Pet. 8. But the standard actually applied by the Eleventh Circuit differs substantively—and markedly—from the preponderance rule applied in other circuits.

1. The Eleventh Circuit, for one, was entirely up-front that it was walking away from the traditional preponderance analysis. The court criticized the standard as "problematic" (Pet. App. 58a), saying it created a "unique tension" (Pet. App. 57a). It said it was "at a loss as to how to apply the preponderance burden meaningfully" and that in its view "any attempt to engage in a preponderance of the evidence assessment at this juncture would necessarily amount to unabashed guesswork" (Pet. App. 60a). Critically, the court acknowledged that if the defendant could "carry the burden of establishing jurisdiction under" its announced unambiguous-statement standard, "then the defendant could have satisfied a far higher burden than preponderance of the evidence." Pet. App. 61a. The court also compared its unambiguous-statement standard with the more stringent "legal certainty" test. Pet. App. 61a n.59.

2. The substance of the Eleventh Circuit's analysis shows that the unambiguous-statement standard differs from the traditional preponderance standard in two key respects. First, a more-likely-than-not assessment of damages will not suffice; the proof must be unambiguous. *See* Pet. App. 61a, 66a & n.63. Second, a defendant's own unambiguous submissions concerning the amount in controversy will not do; the proof must instead come directly from the plaintiff. *See* Pet. App. 66a & n.63. These two differences lead the Eleventh Circuit to disregard at least three different types of evidence—(1) plaintiffs' previous requests for damages exceeding the jurisdictional amount; (2) inferences arising from the sheer number of plaintiffs in the case; and (3) jury verdicts in similar cases—that circuits

applying the traditional preponderance standard routinely allow. *See* Pet. 15–18 (citing cases from the Third, Fifth, and Seventh Circuits). This very case demonstrates that excluding that evidence can change the outcome. *See id.*

3. None of the extensive scholarly commentary on this case supports Respondents' view that the Eleventh Circuit simply applies a traditional preponderance test. Professors Clermont and Eisenberg report that the decision below "all but ridiculed" the preponderance standard. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. __ (forthcoming June 2008), Draft at 18 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014966). The Eleventh Circuit, as they put it, acknowledged that its holding might "in effect push the actual standard toward the higher legal-certainty standard." *Id.* Other commentators characterize the Eleventh Circuit's decision as "wander[ing] far from the mainstream." Thomas M. Byrne & Valerie S. Sanders, *'See No Removal, Hear No Removal': The 11th Circuit's New Posture on Removal in* Lowery v. Alabama Power Co., 25 No. 15 ANDREWS TOXIC TORTS LITIG. REP. 11, 15 (Aug. 29, 2007).

4. In an effort to blur the clarity of the Eleventh Circuit's break from the other circuits, Respondents engraft two provisos onto Eleventh Circuit law that, they say, show that the Eleventh Circuit has retained at least some remnant of the traditional preponderance standard. But neither of those provisos can be squared with the Eleventh Circuit's opinion, and neither makes sense.

a. Respondents first assert that in the Eleventh Circuit, the preponderance rule remains the standard against which the plaintiff's "unambiguous, clear statement" is "tested." BIO 10. Respondents do not explain how or why a court would "test" an unambiguous statement in this way. Regardless, the Eleventh Circuit did not adopt a "test[ing]" protocol, but instead the following rigid, up-or-down toggle:

> If the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand.

Pet. App. 61a. Under the Eleventh Circuit's view, the removing documents either include an unambiguous statement, or they don't. They *are* the evidence. No other evidence—preponderance or otherwise—has a "test[ing]" role to play.

b. Respondents also posit that the Eleventh Circuit applies its unambiguous-statement standard only when the removing defendant submits no evidence of the jurisdictional amount other than the pleadings. So, their argument goes, "[i]f the defendants [here] had chosen to cite to the voluminous discovery in the case or to submit evidence of the amount in controversy with their petition for removal," Petitioners' "burden would have still been by a preponderance of the evidence." BIO 12–13. But Respondents' revisionism doesn't mesh with what actually happened in this case.

Here, the Eleventh Circuit applied the unambiguous-statement requirement even though the removing defendants *did* submit "proof of the amount in controversy" besides the "pleadings." BIO 11. The very question before the Eleventh Circuit was whether the three kinds of proof Alabama Power submitted in its supplement to its removal notice—(1) evidence of settlements and verdicts in similar toxic-tort cases; (2) inferences based on the sheer number of plaintiffs; and (3) the plaintiffs' previous requests for $1.25 million apiece, *see* Pet. 7—established the jurisdictional amount. The Eleventh Circuit analyzed this evidence under the unambiguous-statement standard and found that the evidence could not "satisfy the defendants' burden in proving jurisdiction." Pet. App. 82a–86a. To the extent the Eleventh Circuit saw this as a "fact-free context," Pet. App. 57a, it was only that way because the court refused to consider the "fact[s]" the defendants put forward. The Eleventh Circuit's actions show that it applies the unambiguous-statement standard—and eschews the traditional preponderance standard—even when the defendant has submitted evidence in addition to the pleadings.

B. The Eleventh Circuit's unambiguous-statement requirement breaks from the Second Circuit's reasonable-probability standard.

In addition to creating a stark disparity between removal law in the Eleventh Circuit and in traditional preponderance jurisdictions like the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, the substance of the Eleventh Circuit's analysis is also fundamentally

different from the Second Circuit's "reasonable probability" rule. Respondents dismiss that notion, arguing that the reasonable-probability standard "is really the 'preponderance of the evidence' test." BIO 9. But district courts within the Second Circuit say otherwise. *See, e.g., Ball v. Hershey Foods*, 842 F. Supp. 44, 47 (D. Conn. 1993) (describing the defendant's burden under the reasonable-probability standard as "not a heavy one"), *aff'd*, 14 F.3d 591 (2d Cir. 1993) (Table). In any event, the decision on which Respondents rely—*United Food & Commercial Workers Union v. Centermark Properties Meriden Square*, 30 F. 3d 298 (2d Cir. 1994)—makes clear that the Second Circuit's approach is far less exacting than the Eleventh's. There, the Second Circuit cited with approval a district-court decision that calculated the amount in controversy based on an affidavit submitted not by the plaintiff—as the Eleventh Circuit would have required—but by the removing defendant. *See id.* at 305. And in *United Food* itself, the Second Circuit remanded to allow both parties, including the removing defendant, "to submit evidence on the amount in controversy." *Id.* at 306. Under the Eleventh Circuit's analysis, that remand would have been neither necessary nor appropriate. The pleadings either would have, or wouldn't have, supplied an unambiguous statement establishing jurisdiction; and that would have been the end of the matter.

C. District-court decisions adopting the legal-certainty test exacerbate the split.

The Eleventh Circuit equated its approach with the stringent "legal certainty" test, Pet. App. 61a n.59, and Respondents ignore the numerous district-court

decisions that have adopted that approach, *see* Pet. 11 n.2; *see also* Pet. 14 n.4 (describing some district courts' use of an "inverted legal certainty" test). While district-court division might not merit mention in most cert papers, it is, as this Court has recognized, noteworthy in this particular context. Because 28 U.S.C. § 1447(d) bars appeals of most remand orders in non-class-action cases, the circuits rarely have an opportunity to iron out differences between the district courts on removal issues. So when this Court has had the opportunity to resolve removal-related splits in the past, it has done so even in the absence of full-fledged disagreement among the circuits. *See, e.g., Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 349 & n.2 (1999) (noting certiorari was granted on removal question due to a split populated, on one side, solely by district courts). This case presents this Court with the rare opportunity to bring uniformity to this critical area of the law.

II. The Eleventh Circuit's bar on discovery also warrants review.

When this Court reviews the Eleventh Circuit's stringent approach to the burden of proof, it should also review the Eleventh Circuit's correspondingly stringent take on jurisdictional discovery, which conflicts with this Court's decisions and creates a circuit split of its own.

1. Employing fine distinctions, Respondents try to alleviate the tension between the Eleventh Circuit's ruling and this Court's decisions on jurisdictional discovery. But the fact that only one of those decisions was a "removal" case (BIO 14)—and that none "specifically authorized jurisdictional discovery after

removal" (BIO 15)—is beside the larger point. The point is that this Court's decisions give district courts wide latitude to conduct jurisdictional discovery, and that is difficult to square with the Eleventh Circuit's unyielding bar.

2. Respondents' reliance on Wright and Miller is likewise off-point. *See* BIO 13–14. It is an uncontroversial proposition that district courts should assess their jurisdiction in terms of the amount that was in controversy at the time the case was removed. But no sound principle would limit district courts, in determining what that amount was, to *evidence that was in the record* at that time—particularly when the plaintiffs have refused to specify that amount in the state court.

3. In any event, Respondents do not deny that the Eleventh Circuit's bar on discovery creates a 1-1 circuit split. *See* Pet. 22 (citing *Abrego Abrego v. Dow Chem.*, 443 F.3d 676, 679 (9th Cir. 2006)). They instead argue that even under the Ninth Circuit's approach, "the result would have been the same" here because the Ninth Circuit also recognizes that in some cases district courts have discretion *not* to allow discovery. BIO 15. That, of course, does not change the fact that the circuits are now split on the question whether district courts have discretion to *allow* discovery. But in any event, there is no indication that the result in this case would have been the same had it been decided in the Ninth Circuit. The district court here declined to allow discovery based on its mistaken assumption that the jurisdictional amount was $75,000 per plaintiff (Pet. App. 95a–97a), rather than (as the Eleventh Circuit

held) the approximate $12,500 per plaintiff required under CAFA (Pet. App. 45a–52a). If the Eleventh Circuit had remanded to allow the district court to consider whether discovery would be useful on *that* amount, the district court's calculus would have been decidedly different.

III. This case is important.

Though Respondents suggest that our concerns are "more perceived than real" (BIO 16), the participation of amici like the Defense Research Institute and the Products Liability Advisory Council testifies to this case's real-world importance to the practicing bar. So, too, does the vast number of district-court decisions that, in the year since the decision below, have cited the Eleventh Circuit's opinion and reflexively (and with little prospect for appellate review) remanded cases.[1] Respondents have yet to explain how, under the

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[1] *See, e.g., Beasley v. Fred's Inc.*, 2008 WL 899249, at *2 (S.D. Ala.) (remanding after refusing to consider damages awards in similar cases); *Channell v. Nutrition Distribution*, 2008 WL 220934, at *1 (M.D. Ala.) (remanding despite plaintiff's request for compensatory and punitive damages flowing from liver failure); *Pearson's Pharmacy v. Blue Cross & Blue Shield*, 2007 WL 3496031, at *2 (M.D. Ala.) (remanding despite defendant's observation that each plaintiff need only seek $625 to meet CAFA jurisdictional amount); *Carswell v. Sears, Roebuck*, 2007 WL 1697003, at *1 (M.D. Ala.) (remanding despite plaintiff's request for over $38,000 in medical expenses plus unspecified claims for pain and suffering, mental anguish, and punitive damages); *Thrift Auto Repair v. U.S. Bancorp*, 2007 WL 2788465, at *3 (N.D. Ga.) (remanding after refusing to consider affidavit produced by the defendant).

Eleventh Circuit's approach, a diverse defendant can ever remove its case when the plaintiffs refuse to specify a sum certain in their complaint and to stipulate to one during state-court discovery. In shutting the door to federal court, the Eleventh Circuit's decision substantially affects interstate commerce and reworks the federal-state balance.

The need for this Court's consideration is even more pressing in light of the Class Action Fairness Act. While it is true that this case does not "turn on the provisions of CAFA" (BIO 17), the goals Congress sought to achieve in that statute will be thwarted, in three litigious states, by the tight restraints the Eleventh Circuit has now placed on removal in *all* cases. Under the Eleventh Circuit's twin rulings, a diverse defendant who wishes to remove a case will be forced to rely on the willingness of a state court to compel the plaintiffs, through discovery mechanisms, to specify the precise damages they seek. But it is from those same courts that CAFA—and removal more generally—is supposed to protect defendants.

This case's history provides compelling evidence that defendants cannot rely on these sorts of state-court discovery mechanisms. After years in which the defendants repeatedly requested that Respondents specify their precise damages, the sum total of what Respondents now call the "voluminous" discovery on this question (BIO 12) was each plaintiff's stock response to the following effect:

> Plaintiffs cannot state an exact amount of compensatory damages as such amount will

> be within the sound discretion of the jury. Plaintiffs have lost the use and enjoyment of their property due to the conduct of defendants. Plaintiffs believe that their property value has been decreased due to the pollution of defendants. Plaintiffs have suffered mental anguish damages due to their worrying about health consequences of the pollution, loss of property value and loss of use and enjoyment of their property.

Doc 38 Ex.A, Attachment 62, Ex.5 at ¶27. Because this response does not come close to the unambiguous statement the Eleventh Circuit demands—and because the Eleventh Circuit precludes defendants from compelling plaintiffs to make more specific disclosures through post-removal discovery—the Eleventh Circuit's decision allows plaintiffs to evade federal jurisdiction by stonewalling. This major reworking of federal jurisdiction warrants this Court's review.

Conclusion

This Court should grant certiorari.

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